

**UNITED STATES OF AMERICA  
BEFORE THE  
NATIONAL LABOR RELATIONS BOARD**

COMMUNICATIONS WORKERS OF  
AMERICA, AFL-CIO,

Respondent

and

SISTERS OF CHARITY HOSPITAL OF  
BUFFALO, NEW YORK, ST. JOSEPH  
CAMPUS,

Charging Party

Case Nos. 03-CB-154807/03-CB-162455

**CHARGING PARTY'S BRIEF IN OPPOSITION TO  
RESPONDENT'S EXCEPTIONS TO DECISION OF  
ADMINISTRATIVE LAW JUDGE DONNA DAWSON**

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## TABLE OF CONTENTS

	Page
INTRODUCTION .....	1
A. BACKGROUND FACTS.....	2
1. Catholic Health System.....	2
2. St. Joseph Campus .....	3
B. THE JUDGE PROPERLY CONSIDERED AND COMPARED THE UNION'S CONDUCT IN OTHER BARGAINING TO THE RN NEGOTIATIONS AT ST. JOSEPH CAMPUS .....	4
1. Bargaining Process in Previous Negotiations Between CHS Owned Hospitals and CWA .....	4
2. Bargaining Process for the 2016 Negotiations at Mercy Hospital.....	8
3. Bargaining Process for Bowie's Contract Negotiations with Other Employers.....	11
C. THE JUDGE PROPERLY REFUSED TO FIND THAT THE HOSPITAL'S ACTIONS LIMITED THE UNION'S AVAILABILITY FOR BARGAINING.....	13
1. ULP Charges.....	14
2. Arbitrations.....	15
D. THE JUDGE PROPERLY DISCOUNTED THE SUBSTANTIVE PROPOSALS AND ACTUAL BARGAINING.....	16
1. June 29, 2015 Bargaining Session.....	20
2. August 5, 2015 Bargaining Session.....	22
3. August 12 Bargaining Session.....	22
4. August 19 Bargaining Session.....	23
5. August 24, 2015 Communications.....	24
6. August 26, 2015 Bargaining Session.....	24
7. August 27, 2015 Communication.....	25
8. August 31, 2015 Bargaining Session.....	25
9. September 17, 2015 Bargaining Session.....	27
10. September 28, 2015 Bargaining Session.....	27
11. October 2015 Communication for Bargaining Dates.....	28
12. October 13, 2015 Bargaining Session.....	28
13. October 30, 2015 Bargaining Session.....	29
14. Bowie's October 31 Email to the Union Bargaining Committee.....	30
15. November 20, 2015 Bargaining Session.....	30
16. November 25, 2015 Bargaining Session.....	31
17. December 7, 2015 Bargaining Session.....	32
18. December 8, 2015 Request for Bargaining Dates.....	32
19. December 23, 2015 Bargaining Session.....	33
20. January 4, 2016 Communications.....	34
21. January 6, 2016 Bargaining Session.....	34

22. January 11, 2016 Communications.....	35
23. January 28, 2016 Bargaining Session.....	36
24. Bowie’s Return from Vacation and Scheduling of Bargaining Dates for the Mercy Negotiations.....	36
25. February 11, 2016 Bargaining Session.....	37
26. February 19, 2016 Bargaining Session.....	37
ARGUMENT.....	38
A. THE JUDGE CORRECTLY FOUND THAT THE UNION FAILED TO MEET AT REASONABLE TIMES.....	39
B. THE JUDGE CORRECTLY HELD THAT BOWIE’S WORK SCHEDULE DID NOT MITIGATE, OR RELIEVE, HER DUTY TO MEET AT REASONABLE TIMES.....	44
C. THE JUDGE CORRECTLY FOUND THAT BOWIE’S CONDUCT WAS NOT ONLY DILATORY AND IN BAD FAITH.....	47
CONCLUSION.....	50

## TABLE OF AUTHORITIES

	Page
<i>Atlanta Hilton and Tower</i> , 271 NLRB 1600 (1984).....	17
<i>Barclay Caterers</i> , 308 NLRB 1025, 1035-1037 (1997).....	45, 46, 49
<i>Calex Corp.</i> , 322 NLRB 977 (1977).....	17-18, 42, 45, 49
<i>Camelot Terrace</i> , 357 NLRB 1934 (2011).....	43, 49
<i>Caribe Staple Co.</i> , 313 NLRB 877, 893 (1994).....	46
<i>Crane Co.</i> , 244 NLRB 103, 111 (1979).....	46
<i>Cummer-Graham Company</i> , 122 NLRB 1044.....	46
<i>Eastern Maine Medical Center</i> , 253 NLRB 224, 247 (1980).....	43, 47, 49
<i>Exchange Parts Company</i> , 139 NLRB 710 (1962), enf'd 339 F.2d 829 (5th Cir. 1965).....	38, 46
<i>Garden Ridge Management, Inc.</i> , 347 NLRB 131 (2006).....	41, 49
<i>Imperial Tile Co.</i> , 227 NLRB 1751, 1754 (1977).....	46
<i>J.H. Rutter-Rex Manufacturing Company, Inc.</i> , 86 NLRB 470, 506-507 (1949).....	38
<i>Lawrence Textile Shrinking Co.</i> , 235 NLRB 1178, 1179 (1978).....	45
<i>Local Union #612, International Brotherhood of Teamsters, Chauffeurs, Warehouseman and Helpers of America</i> , 215 NLRB 789, 791 (1974).....	39, 45, 49
<i>Lower Bucks Cooling &amp; Heating</i> , 316 NLRB 16, 22 (1995).....	49
<i>“M” System, Inc., Mobile Home Division Mid-States Corporation</i> , 129 NLRB 527, 548-549 (1960).....	38, 45, 46
<i>Nursing Center at Vineland</i> , 318 NLRB 901, 905 (1995).....	43, 46
<i>O&amp;F Machine Products Co.</i> , 239 NLRB 1013, 1018-1019 (1978).....	45, 46
<i>People Care, Inc.</i> , 327 NLRB 814 (1999).....	49
<i>Regency Service Carts, Inc.</i> , 345 NLRB 671, at 673-674, 716-717 (2005).....	49

<i>Rhodes St. Clair Buick</i> , 242 NLRB 1320, 1323 (1979).....	18
<i>Teamsters Local Union No. 122, International Brotherhood of Teamsters,</i> <i>AFL-CIO</i> , 334 NLRB 1190, 1248 (2001).....	39, 43, 44, 46, 49

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NOW COMES SISTERS OF CHARITY HOSPITAL OF BUFFALO, NEW YORK, ST. JOSEPH CAMPUS (hereinafter referred to as “St. Joseph Campus,” “SJC” or the “Hospital”), by and through its attorney Larry Hall of FordHarrison LLP and, pursuant to Section 102.46 of the NLRB’s Rules and Regulations, Series 8, as amended, hereby files its Brief in Opposition to Respondent’s Exceptions.<sup>1</sup>

**INTRODUCTION**

After a two day hearing, Administrative Law Judge (“ALJ” or “Judge”) Dawson found that the Communication Workers of America (the “CWA” or the “Union”) violated Section 8(b)(3) of the Act by failing to meet and bargain at reasonable times with Sisters of Charity Hospital of Buffalo, New York, St. Joseph Campus. In doing do, the ALJ relied upon the overall conduct and

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<sup>1</sup> References to the ALJ’s Decision shall be designated as (ALJ \_\_\_\_:\_\_\_\_) showing the page number first followed by the line numbers; to the Respondent’s Brief as (R.B. \_\_\_\_); to the transcript as (Tr. \_\_\_\_); to the General Counsel’s Exhibits as (G.C. Ex. \_\_\_\_); to the Charging Party’s Exhibits as (C.P. Ex. \_\_\_\_); and to the Respondent’s Exhibits as R. Ex. \_\_\_\_).

unavailability of the Union's chief negotiator, Erin Bowie. Contrary to the protestations of the Union, the ALJ did review the totality of the circumstances — much of which the Union conveniently does not address in its brief. When Bowie's conduct is viewed in its entirety, both at and away from the bargaining table, it is clear that the Union, through Bowie, failed and refused to meet and bargain at reasonable times.

## **A. BACKGROUND FACTS**

### **1. Catholic Health System**

Sisters of Charity Hospital of Buffalo, New York consists of two acute-care hospitals. One of these hospitals, referred to as Sisters, or Sisters of Charity, is located in northern Buffalo, and is not involved in this case. The other Sisters of Charity hospital is referred to as St. Joseph's or the St. Joseph Campus and is located in Cheektowaga, New York, a suburb of Buffalo. (ALJD 2:11-15; Tr. 35, 174-175) The St. Joseph Campus is the hospital involved in this proceeding.

The two Sisters of Charity Hospitals are owned by Catholic Health System (hereinafter "Catholic Health" or "CHS"). CHS owns a number of health care facilities in the Buffalo metropolitan area, including five acute-care hospitals. The five hospitals are Mercy Hospital, Kenmore Mercy Hospital, Mount St. Mary's Hospital and the two Sisters of Charity hospitals. (ALJD 2:12-15; Tr. 34-35)

Employees at four of these hospitals are represented by various Unions. Sisters of Charity Hospital in Buffalo is the only unrepresented hospital. At the four represented hospitals, employees are represented by four different Unions in 11 different bargaining units. (Tr. 35; C.P. Ex. 1)

The CWA represents the following bargaining units at three of the CHS owned hospitals:

<b><u>Hospital</u></b>	<b><u>Union</u></b>	<b><u>Bargaining Unit</u></b>
Sisters of Charity, St. Joseph Campus	CWA	Registered Nurses

Sisters of Charity, St. Joseph Campus	CWA	Service
Mercy	CWA	Registered Nurses
Mercy	CWA	Service, Technical, Clerical
Kenmore Mercy	CWA	Registered Nurses
Kenmore Mercy	CWA	Technical

(C.P. Ex. 1)

Thus, the CWA represents two bargaining units each at St. Joseph Campus, Mercy and Kenmore Mercy. (ALJD 2:14-17; Tr. 36) While there are Local Unions at each of these hospitals, the only parties to the various collective bargaining agreements are the respective hospital and the CWA. (Tr. 228) The respective Local Union is not a party to any of these contracts. (G.C. Ex. 2, at p. 4) CWA Local 1168 is chartered for the two units at St. Joseph Campus and CWA Local 1133 is at both Mercy and Kenmore Mercy. (Tr. 36)<sup>2</sup>

## **2. St. Joseph Campus**

St. Joseph Campus has three bargaining units. The technical employees are represented by the SEIU and covered by a contract which expires May 31, 2017. The service employees are represented by the CWA and its Local 1168. The service employee contract was negotiated in the summer of 2014 and is in effect for four years, expiring August 15, 2018. (Tr. 107, 135; C.P. Ex. 1)

The Registered Nurses (“RN”) at St. Joseph Campus are also represented by the CWA and its Local 1168. The RN unit is comprised of approximately 200 Registered Nurses. (ALJD 2:19-26; Tr. 185) The RN contract was last negotiated in 2012. It was a three year contract and expired August 31, 2015. (ALJD 2:28-30)

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<sup>2</sup> Local 1133 represents employees only in those bargaining units at Mercy and Kenmore Mercy hospitals. (Tr. 160, 249-250) While Local 1168 has the two bargaining units at St. Joseph Campus, Local 1168 also represents employees who work at the Kaleida Health System. (Tr. 251) Kaleida is the other major health care provider in the Buffalo area and is Catholic Health’s major competitor. (Tr. 173) The officers of Local 1168 are employed by, and work at, Kaleida. (Tr. 252) As Erin Bowie testified, the primary membership and the primary responsibilities of Local 1168 are at Kaleida, not St. Joseph Campus. (Tr. 251)



**B. THE JUDGE PROPERLY CONSIDERED AND COMPARED THE UNION'S CONDUCT IN OTHER BARGAINING TO THE RN NEGOTIATIONS AT ST. JOSEPH CAMPUS**

**1. Bargaining Process in Previous Negotiations Between CHS Owned Hospitals and CWA**

For the past five years, the chief spokesperson for all of the Catholic Health hospitals has been Elisha Tomasello. Tomasello is employed by Catholic Health as Vice President HR Services. (Tr. 33-36) As VP, HR Services, Tomasello manages six departments, one of which is labor relations. In the labor relations department, Tomasello is responsible for negotiating contracts in all 13 different bargaining units, handling grievances, conducting arbitrations and providing advice to each of the Catholic Health care facilities. (Tr. 35-36) During this same time period, with one exception, the chief spokesperson for the CWA has been Erin Bowie. Bowie is a Staff Representative for District 1 of the CWA. (Tr. 38, 183-84, 269)<sup>3</sup> As a Staff Representative, Bowie negotiates contracts, administers the grievance procedure at Step 3 or beyond, assists counsel in arbitration<sup>4</sup> and occasionally assists in organizing campaigns. (Tr. 184) Negotiating contracts on behalf of the CWA members is a primary function of not only Bowie but also District 1 of the CWA. (Tr. 274)

As described above, the CWA represents six different bargaining units at three of the Catholic Health owned hospitals, including St. Joseph Campus. (ALJD 2:12-17; Tr. 36; C.P. Ex.

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<sup>3</sup> The CWA's structure divides the country into geographic territories, known as a District. District 1 includes the New England states, as well as New York and New Jersey. District 1 has five offices, with each office covering a portion of that territory. Buffalo is one of these five offices. (Tr. 271-72) Bowie works out of the Buffalo office and is assigned to Upstate New York. In District 1 there are 20 Staff Representatives who negotiate contracts. In the Buffalo office, contract negotiations are done by Bowie, John Klein, the other Staff Representative, and Deb Hayes, the Area Director. (Tr. 272-73)

<sup>4</sup> The Union claims that Bowie had to handle a high level of grievances with the Catholic Health units, and the arbitrations which arose from those grievances. The Union argues that because there were so many grievances at the CHS hospitals that it impacted Bowie's time to negotiate. While Bowie initially elaborated on how much time she spent preparing for arbitration (Tr. 230-232), on cross-examination Bowie admitted that there were no arbitrations for St. Joseph Campus in 2015. Bowie then conceded that starting in 2015 she no longer handled any arbitrations, as the CWA decided to use attorneys for all arbitrations. (Tr. 324)

1) During the past five years, each of these six bargaining units has completed a full negotiation resulting in a ratified contract and four of these six bargaining units are now currently in the process of negotiating a renewal contract.

Tomasello has been the chief spokesperson for the CHS owned hospitals for the past five years and in the four negotiations that are now in process. (ALJD 2:32-34; Tr. 33-36) Bowie was the chief spokesperson for the CWA and is the chief spokesperson in the four negotiations that are ongoing. (ALJD 2:32-34; Tr. 38, 276-77)

Dawn McDonald is the Manager of Human Resources at the St. Joseph Campus hospital. She has held that position since early 2014. Prior to that, McDonald worked in the Human Resources Department at Kenmore Mercy Hospital. (ALJD 2:46-48; Tr. 133, 135)

McDonald was on the St. Joseph Campus bargaining committee for the 2014 service employee negotiations and is on the Hospital's bargaining committee for the ongoing negotiations with the Registered Nurses. While at Kenmore Mercy, McDonald participated in negotiations as far back as 2009, including the Registered Nurse negotiations with the CWA in 2009 and 2013. (Tr. 135)

Based on their multiple previous negotiations with the CWA, Tomasello and McDonald explained the negotiation process with the CWA prior to the 2015 negotiation of the Registered Nurse contract at the St. Joseph Campus.<sup>5</sup>

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<sup>5</sup> In its brief, the Union argues that the ALJ erred by considering Bowie's practice or conduct in prior negotiations. (R.B. 27-28) The Union's argument offers no valid explanation why Bowie's prior history is not now relevant. Tomasello was the chief spokesperson for CHS hospital negotiations during this time period and Bowie was the CWA's chief spokesperson for these negotiations. Thus, the two people who led the negotiations for their respective side, and who scheduled negotiation meetings and determined the length of each meeting remained the same. Bowie also testified that the contracts with the Catholic Health System hospitals – St. Joseph Campus, Mercy and Kenmore Mercy – are with the CWA, not the Local Union. Thus, Bowie's prior conduct and process of negotiations with the various CHS owned hospitals is very relevant in viewing Bowie's conduct in the 2015-2016 RN negotiations.

Tomasello and McDonald each testified that, before the 2015 negotiations at St. Joseph Campus, in every one of the CWA negotiations with a CHS owned hospital, the negotiations would start approximately two months prior to contract expiration. (Tr. 38, 134) Prior to that first meeting, Tomasello and Bowie would agree on a meeting schedule for the two months of negotiations prior to the scheduled expiration date. This pre-set schedule would be one meeting each week for those two months. (Tr. 38, 42, 136)

Then, in the last month prior to contract expiration, Tomasello and Bowie's practice was to add more negotiation meeting dates to the schedule in an effort to complete negotiations by the expiration date. As the expiration date neared, the parties would negotiate up to three days per week. (ALJD 2:34-38; Tr. 38, 136, 138)<sup>6</sup>

The 2012 Registered Nurse contract negotiations at St. Joseph Campus started on Thursday, June 28. Tomasello and Bowie agreed to meet every Thursday in July and August. The contract expired on Friday, August 31, 2012. In that last week, they added two more dates to the previously scheduled meeting date of Thursday, August 30. After the contract expired, the parties continued to bargain past midnight, into Saturday morning. Negotiations continued on Monday, September 3, 2012, when a tentative agreement was reached. (Tr. 96-97) As described above, this was the negotiation resulting in significant economic concessions. (ALJD 2:38-40; Tr. 97, 186, 325-326)

Despite the Union's statement to the contrary (R.B. 9), neither the Union or Bowie ever set a predetermined, arbitrary start and stop time for the negotiations on any given meeting day in any

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<sup>6</sup> The only exception to this practice was when the CWA first became the representative of the technical employees at Kenmore Mercy in 2010. As Tomasello explained, since that was a first contact, there was no expiration date to work against. (Tr. 109-110) While the Union criticized Judge Dawson for not considering the length of that negotiation, (R.B. 10) that first contract negotiation was not like any of these contract renewal negotiations. Nor was Tomasello the chief spokesperson in that negotiation. (Tr. 109-110)

prior negotiations between the three CHS owned hospitals and the CWA, much less unilaterally announced a start and stop time at the outset of the negotiations. (Tr. 38, 97) Rather, the parties would typically continue to negotiate beyond 5:00 p.m. It was not unusual for the negotiations to continue until 7:00 p.m. or later. As Tomasello explained, in those 2012 RN negotiations at St. Joseph Campus, on the August 31 expiration date the parties negotiated past midnight into the following morning. (Tr. 97) Clearly, in prior negotiations, the addition of bargaining dates and negotiating into the evening and beyond showed that both Tomasello and Bowie had a sense of urgency based on the contract expiration date. But on the first day of the RN contract renewal negotiations in 2015, Bowie unilaterally set the bargaining schedule to be 9:00 a.m. to 5:00 p.m. (Tr. 294-299)<sup>7</sup>

In its brief, the Union criticized the Judge for noting that Bowie did not ask the Union's bargaining committee to adjust their vacation schedules, arguing that the parties had never done that before. (ALJD 3:fn. 2; R.B. 8) What the Union ignores is that the parties had never previously allowed vacation conflicts to interfere with negotiations in any of the CWA represented units. Accordingly, there was no reason for either party to ask their committees to adjust their vacation schedules in the past. As McDonald testified, if the Union bargaining committee members had scheduled a vacation, the negotiations continued without that person. (Tr. 153-154) McDonald and Tomasello both testified that negotiations were not delayed, or meetings postponed or cancelled because of either Hospital or Union bargaining committee members' vacations. (Tr. 107-108, 153-154) Despite this history, Bowie used vacation schedules as a primary reason for not meeting a single day in July 2015.

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<sup>7</sup> Thus, without knowing what to expect over the coming months, Bowie unilaterally determined, up front, what each day's bargaining schedule would be. There was no discussion and no movement. Bowie lived up to this at each bargaining session as she alone determined when each bargaining session ended.

Bowie did not dispute any of this testimony regarding how previous negotiations were conducted at these Catholic Health hospitals.

## **2. Bargaining Process for the 2016 Negotiations at Mercy Hospital**

The Union faults the Judge for considering and comparing how Bowie handled the negotiations at Mercy Hospital, one of the other CHS owned hospitals. (R.B. 10-11) The Union's arguments are misplaced.

In her decision, in identifying the multiple reasons supporting the conclusion that the Union failed and refused to meet and bargain at reasonable times, the Judge stated:

The most blatant example of Respondent's unreasonable failure to meet is shown by Bowie's February 2016 phone call to Tomasello to arrange bargaining dates for upcoming negotiations dealing with 2 Mercy Hospital units, whose contracts would not expire until June of 2016. At that point, the parties had been bargaining sporadically —due to Bowie's unavailability — for 5 months after the expiration of the Local 1168 RN contract. Yet Bowie readily proposed to bargain 2 days a week for the next few months, with more dates near the expiration of the Mercy Hospital contracts. These were similar to schedules she and Tomasello had utilized in previous Local 1168 RN negotiations, but schedules she refused to apply to the ongoing Local 1168 RN negotiations. Remarkably, Bowie never even mentioned the Local 1168 RN negotiations in that February 2016 call to Tomasello.

(ALJD 9:1-10)

The evidence fully supports the Judge's analysis and conclusion. The two CWA represented bargaining units at Mercy Hospital of Buffalo include one unit of Registered Nurses and one unit for the Service, Technical and Clerical ("STC") employees. Both of those contracts were scheduled to expire on June 3, 2016. (Tr. 127-128, 239-240; C.P. Ex. 1)

When Bowie returned from vacation in early February 2016,<sup>8</sup> she called Tomasello for the sole purpose of scheduling dates for the contract renewal negotiations at Mercy Hospital. During this conversation, Bowie proposed that the parties meet for bargaining twice each week for the

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<sup>8</sup> Bowie was on vacation for approximately six weeks from December 25, 2015 until February 2, 2016. (Tr. 52, 77; C.P. Ex. 4)

months of March, April and May. In that same conversation, Bowie said that as they neared expiration of the two Mercy contracts, they should add more meeting dates to the negotiation schedule. Tomasello accepted Bowie's proposed schedule. (Tr. 82-83, 101-103, 127-128) At no time during this conversation did Bowie offer any bargaining dates for the St. Joseph Campus RN negotiations even though that contract had expired six months earlier.

This negotiation schedule proposed by Bowie for the Mercy negotiations had the parties meeting on Tuesday and Thursday of each week. The Tuesday meeting was for the Service, Technical and Clerical unit and Thursday was for the Registered Nurse unit. (Tr. 127-128) Thus, in each of these two bargaining units, Bowie proposed, and the parties agreed, to a preset schedule of 13 bargaining dates for each bargaining unit (a total of 26 meeting dates) during the three month time period prior to contract expiration. This number does not include any additional dates that Bowie and Tomasello agreed will be added as needed in May 2016.

Bowie confirmed this meeting schedule. (Tr. 239, 247-248, 323) Bowie did not dispute any of Tomasello's testimony on the Mercy negotiations. (Tr. 239)

In contrast, at the St Joseph RN negotiation, Bowie initially proposed to not start negotiations until August and refused to meet in June or July 2015. Bowie reconsidered only after Tomasello reminded her that the contract required bargaining to start at least sixty days prior to contract expiration. Faced with a contract violation, Bowie agreed to meet only one day, on June 29, 2015. Prior to doing so, Bowie sent an email to her bargaining committee, stating "We can also meet with a partial committee. There will be no progress on this day." (C.P. Ex. 2) Why would Bowie make such a comment? Unless she was just going through the motions. Bowie then refused to meet at all in July.

After the contract expired on August 31, 2015, Bowie would only meet two days each month through February 2016, regardless of her actual availability.

In its brief, the Union attempts to explain away Bowie's February 2016 call to Tomasello by claiming that Bowie wanted to set a bargaining schedule at Mercy because the Region had issued a Consolidated Complaint on the St. Joseph Campus RN negotiations and the Union wanted to avoid another ULP charge in another bargaining unit. (R.B. 10-11) The Union's argument ignores the facts and reality. The Union's claim is no more than a *post hoc* rationalization with no evidentiary support. Bowie never testified that the reason she called Tomasello to set up a three month negotiation schedule for Mercy was to avoid more ULP charges.

If the issuance of a Complaint really caused the Union to change its behavior in order to avoid more ULP charges, why didn't Bowie, or the Union, offer more bargaining dates in the St. Joseph RN negotiations after the Region issued the first Complaint in this case on October 28, 2015? Indeed, in mid-October 2015, when the Union learned that the Region had found merit to the Hospital's first ULP charge, the CWA's response was to distribute a handbill/flyer at various Catholic Health System hospitals including St. Joseph Campus. The handbill/flyer addressed both the ongoing RN negotiations at St. Joseph Campus and the ULP charge filed against the CWA for failing to bargain at reasonable times. The CWA handbill/flyer stated as follows:

The labor board also said the Union should have scheduled one or two days of negotiations back in July even though vacation schedules and ongoing Red Cross negotiations made that impossible. Since then, the Union has scheduled at least two sessions each month and will continue to do so until we reach a contract settlement that is good for employees and good for our patients.

(Tr. 67-69; G.C. Ex. 9)

This flippant reaction to the Region's issuance of the first Complaint stands in stark contrast to Bowie's February 2016 call to Tomasello requesting a three month bargaining schedule at Mercy.

From August 31, 2015, the date the RN contract expired, through February 29, 2016, the parties met two times each month. It made no difference how many dates the Hospital offered, or how many times the Hospital said it would clear its calendar, the CWA, through Bowie, limited the bargaining to two dates each month. (Tr. 69, 137) Based on the October handbill/flyer, and what actually occurred, the CWA decided that it would meet only twice each month regardless of the Hospital's requests or whether Bowie had more dates available.

Based on this evidence of the Union's actual reaction to the issuance of a Complaint, it is impossible to believe its *post hoc* rationalizations regarding Bowie's February 2016 request for meeting dates in the Mercy contract renewal negotiations. There is also no evidence that Bowie, or the CWA, has set any arbitrary start or stop times in the Mercy negotiations on the days that the parties have agreed to meet

### **3. Bargaining Process for Bowie's Contract Negotiations with Other Employers**

While the Union acknowledges that "the law does not allow the Union to use a busy schedule as an excuse to fail to meet" (R.B. 8), the Union defends Bowie's refusal to schedule bargaining dates in June and July 2015 (except for June 29) relying on her busy negotiation schedule. (R.B. 7-8)

Bowie negotiated the St. Joseph Campus RN contract in 2012. Thus, she knew it expired August 31, 2015. (G.C. Ex. 2 at p. 83) Indeed, Bowie sent a letter to the Hospital on May 27, 2015 serving notice to terminate that contract. (Tr. 40; G.C. Ex. 3)

While the Union claims that Bowie "unexpectedly had a large volume of work" in June and July, it was hardly unexpected. Negotiators know years in advance of a contract expiration date. During May, June and July of 2015, Bowie was involved in three negotiations with employers other than St. Joseph Campus. These negotiations were with Frontier and the American



Red Cross. The two Frontier contracts expired July 23, 2015. (Tr. 306-307, 311) The American Red Cross contracts extended until June 30, 2015. (Tr. 309)

Bowie explained that in those negotiations, future bargaining dates would be agreed upon at the end of one calendar month for the following calendar month. Using the Frontier bargaining as an example, Bowie testified that on May 28, 2015, the last bargaining date in May, the parties would have agreed to the bargaining dates for June. (Tr. 310-311)

Using her personal calendar, Bowie testified that she scheduled, and was in negotiations, on the following dates for Frontier:

May 4, 5, 6 and 7	May 11,12, 13 and 14	May 18 and 19
May 26, 27 and 28	June 1, 2, , 4 and 5	June 11 and 12
June 16 and 17	July 2	July 10
July 13, 14 and 15	July 22, 22 and 23	

(Tr. 306-311; C.P. Ex. 6)

and for the American Red Cross negotiations:

June 22, 23, 24, 25 and 26	June 30	July 1
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(Tr. 309; C.P. Ex. 6)

On June 15, 2015, after a conversation on June 12 between Tomasello and Bowie and Tomasello's June 15 email in which Tomasello repeatedly requested bargaining dates for the St. Joseph Campus RN negotiations, Bowie had at least nine open dates in July. Bowie testified that in her bargaining at both Frontier and American Red Cross, she would set the bargaining dates for the next calendar month on the last bargaining date of that month. In the Frontier negotiations, the June bargaining dates were set on May 28, the last date of bargaining in May. (Tr. 310-311) Looking at Bowie's June calendar, the last day of Frontier bargaining was held on June 17 and the last day of American Red Cross bargaining was June 30. (Tr. 308-310; C.P. Ex. 6) Thus, on June 17, at the last bargaining date with Frontier in June, Bowie would have proposed eight bargaining

dates in July for the Frontier negotiations. On June 30, Bowie would have proposed one bargaining date in July for the American Red Cross negotiations. (C.P. Ex. 6) So, when Bowie told Tomasello in their phone conversation on June 12 that she had no availability until August, Bowie actually had at least nine open days in July. It was not until June 17 and June 30, long after that June 12 telephone conversation with Tomasello that Bowie agreed to nine bargaining dates in July with other employers. Bowie's communications with Tomasello were, at best, disingenuous. Based on her self-described scheduling practice, Bowie's statement to Tomasello in the June 12 conversation that she had no availability until August was simply not truthful.

The Judge noted that Bowie repeatedly bargained on consecutive or multiple days in a week with other employers at the same time that she refused to meet in the RN negotiations, and that Bowie never offered to meet on consecutive days in the RN negotiations. (ALJD 3:fn. 3, 9:31-36)

During the three months of May, June and July 2015 and in three different negotiations, Bowie conducted negotiations on consecutive days in the same negotiation with one employer at least 11 times. There were only two examples of single day negotiations. On the consecutive day occurrences, Bowie conducted negotiations on three consecutive days with one employer on three occasions, on four consecutive days with one employer on two occasions and on five consecutive days with one employer on two occasions. (Tr. 306-311; C.P. Ex. 6) In nine months of negotiations with St. Joseph Campus, Bowie never once offered to meet on consecutive days or on multiple days in the same week.

**C. THE JUDGE PROPERLY REFUSED TO FIND THAT THE HOSPITAL'S ACTIONS LIMITED THE UNION'S AVAILABILITY FOR BARGAINING**

In its brief, the Union argues that the Union should be excused from its statutory obligation to meet and bargain at reasonable times because the Union had filed many grievances and ULP

charges against various hospitals owned by Catholic Health and because Bowie was tied up in arbitrations with St. Joseph Campus and other hospitals. (R.B. 28-29) Thus, the Union blames its refusal to schedule more bargaining dates with St. Joseph Campus on St. Joseph Campus and other CHS owned hospitals. The Union does not cite any NLRB decisions in support of its “novel” theory.

If the Union’s assertions were factually correct — and they are not — it would not make a difference because it is the Union’s role and function to handle all of these matters. As the Union conceded, “the law does not allow the Union to use a busy schedule as an excuse to fail to meet.” (R.B. 8) Despite the Union’s assertions based on grievances, arbitrations and ULP charges, its “excuses” for Bowie’s refusal to meet and bargain at reasonable times find no factual support.

#### **1. ULP Charges**

In its brief, the Union claims that Bowie had to spend time dealing with ULP charges that had been filed against various Catholic Health owned hospitals (R.B. 28-29), and that Bowie had to give affidavits, work on settlements and meet with witnesses. (Tr. 229) The CWA refers to three Complaints issued by Region 3, involving multiple ULP charges, as well as a settlement in another ULP case. (R.B. 28-29; R. Exs. 7, 8, 9 and 10)

It is important to note the following:

- The ULP charge in 3-CA-133735 was filed July 31, 2014.
- The ULP charges in 3-CA-148188, et al. were all filed on March 15, 2015.
- The ULP charge in 3-CA-149508 was filed on April 6, 2015 with an amended charge on June 26, 2015.

Thus, if Bowie had given affidavits or spent any time on any of these cases, that would have occurred before bargaining started at St. Joseph Campus. Bowie conceded that all of these cases

settled before trial. (Tr. 262) Bowie also admitted that her involvement in the settlement of 3-CA-164007 involved about one hour of her time. (Tr. 263)

Bowie's personal calendar tells the true story. Bowie's calendar for May 2015 through January 2016 is very detailed, listing her activities on each day. However, for this nine-month period, which covers the first seven months of the St. Joseph Campus RN negotiations, there is not a single entry – not one – that is related to any of these unfair labor practice charges against the Catholic Health owned hospitals. (C.P. Ex. 6) Bowie did not dispute or explain this complete absence of time spent on these ULP charges.

## **2. Arbitrations**

The Union then claimed that there was a large volume of grievances and that many of these grievances go to arbitration. The Union then states that for each arbitration, Bowie needed two days to prepare the case, then another prep day the day before the hearing and then the day of the hearing. (R.B. 29; Tr. 230-232) In doing so, the Union ignores Bowie's testimony on cross-examination.

On cross-examination, Bowie admitted that there were no arbitration hearings involving St. Joseph Campus in 2015. Bowie also admitted that starting in 2015 she no longer handles arbitrations because the CWA decided to use attorneys for all arbitrations. (Tr. 324)

In its brief, the Union claims that "in February alone the parties moved 10 cases to arbitration, which took away many days." (R.B. 29) This statement is very misleading. Based on footnote 2 of their brief, the Union states that dates are in 2015 unless stated otherwise. (R.B. 4) But, Bowie testified that when she returned from vacation in February 2016 that they selected ten cases for arbitration. (Tr. 231-232) Bowie says that she talked to the new person, Diane, about this. This all occurred in February 2016 — not 2015. So, any "preparation" that may have

occurred would have been done after the date of the hearing in this case. Also, as noted above, Bowie no longer handled arbitrations as the CWA decided in 2015 to have attorneys handle the hearings rather than Bowie.

Based on Bowie's testimony that St. Joseph had no arbitrations in 2015 and that starting in 2015 she no longer handled arbitrations because the Union decided to use attorneys, the Union's arguments have no evidentiary support and are disingenuous. The Judge was correct in discounting the impact of these ULP charges, grievances and arbitrations because any time Bowie might have spent on these matters after June 2015 was negligible at best.

**D. THE JUDGE PROPERLY DISCOUNTED THE SUBSTANTIVE PROPOSALS AND ACTUAL BARGAINING**

In its brief, the Union claims that the Judge committed error when she stated that the "substantive proposals are of marginal relevance in this type of case" and that her "findings are based only to a limited extent" on the proposals and substance of bargaining. (ALJD 4:fn. 4; R.B. 11) The Union's entire argument and premise is misguided as the Judge did not "ignore" the substantive proposals and bargaining. Rather, her reliance on the proposals was "limited" because they were of "marginal relevance."<sup>9</sup>

In its brief, the Union touts the fact that the parties reached agreement on 49 items (R.B. 2), then describes the proposals made at each meeting. (R.B. 12-26) In doing so, the Union conveniently ignores the "substance" surrounding its claims.

When the hearing closed on March 1, 2016, the St. Joseph Campus RN negotiations were ongoing. The contract had expired six months earlier. Only four negotiation dates had been scheduled for the two months of March and April. (Tr. 149-150)

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<sup>9</sup> The Union cites *Atlanta Hilton and Tower*, 271 NLRB 1600 (1984) as support for its contention. (R.B. 11) However, that case did not involve allegations of a failure to meet at reasonable times. Rather, that case involved a claim of bad faith, or surface, bargaining.

While the parties had reached agreement on 49 items, 21 of those agreed-to proposals maintained current contract language with no change. Eight of those 49 agreed-to proposals deleted current language. (Tr. 330; R. Ex. 2) So, in over eight months of bargaining, the parties agreed on only 20 proposals that actually changed or contained new language.

As of March 1, 2016, 49 proposed items remained open. These open items included:

• Wages	• Retirement Plans
• Shift Differential	• Staffing
• Supplemental Pay	• Overtime
• Paid Time Off	• Shift Rotation
• Health Insurance	• Floating
• Prescription Insurance	

(R. Ex. 2)

Thus, virtually every economic, or important language, proposal remained open. (Tr. 325-326)

In its brief, the Union argues that although the Union has not agreed to more bargaining dates as requested by the Hospital, it cannot be found to have violated Section 8(b)(3) because many proposals were exchanged and progress has been made in negotiations. (R.B. 11-27; Tr. 28, 191-200, 330; R. Ex. 2) The Union claims that since the parties reached agreement on 49 items (R.B. 2; Tr. 28), that this should somehow absolve it of any duty to meet at reasonable times.

As described above, while there are 49 agreed-to items, 21 of those are to simply maintain current contract language with no change. Eight of the 49 are to delete language no longer applicable. (Tr. 330; R. Ex. 2) After eight months of bargaining, the parties agreed to only 20 proposals that represent any change or new language. A review of the Union's proposal summary shows that 49 significant proposal items remain open including all of the economic items. (Tr. 325-326; R. Ex. 2)

In any event, "progress" in the negotiations has not been recognized as a defense by the NLRB to a charge that a party has refused to meet at reasonable times. For example, in *Calex*

*Corp.*, 322 NLRB 977 (1977), the employer agreed to meet once or twice each month over a 15 month period. The scheduled was dictated by the “busy” schedule of the employer’s lead negotiator. The employer claimed that it could not be found to have bargained in bad faith because agreement had been reached on 75 percent of the contract language. The Board disagreed, finding that the employer violated the law by failing to meet at reasonable times. In doing so, the Board held:

Finally, given the pattern of purposeful delay which the Respondent employed here to thwart the bargaining process, the Respondent cannot now persuasively defend against a charge of bad-faith bargaining by asserting that the parties had reached agreement on approximately 75 percent of the contract after 15 months of bargaining. For if the Respondent had agreed to the Respondent Union’s requests for more frequent meetings, as it should have if the Respondent had been sincerely desirous of reaching an agreement, the parties might have reached agreement in less time. *Rhodes St. Clair Buick*, 242 NLRB 1320, 1323 (1979). In sum, we agree with the judge’s conclusion, which was based on an examination of the Respondent’s overall conduct in bargaining, that the Respondent violated Section 8(a)(5) by failing and refusing to meet at reasonable times with the Respondent Union for the purpose of collective bargaining.

322 NLRB 977, at 978

More relevant to this analysis is how Bowie responded to Tomasello’s repeated requests for more meeting dates, as well as the actual record of meetings. When the hearing closed on March 1, 2016, the Union had offered, and the parties had held bargaining meetings on 18 days during the first eight months of bargaining. (Tr. 46,137, 189) On those 18 days, the parties met face-to-face in the negotiation room for a total of less than 37 hours — an average of about two hours each day. (G.C. Ex. 7) Eighteen days for a total of 37 hours over eight months.

From the contract expiration date of August 31, 2015, through February 2016, the Union offered to meet exactly two times each calendar month (Tr. 249) without exception and with absolutely no flexibility on the dates. If the Hospital could not meet on one or both of the dates offered by Bowie for a particular month, there would not have been any negotiations that month.

(Tr. 73-74) Also, since the contract expired, Bowie would wait until the end of each calendar month before she would offer dates for the next month.

When the August 31 contract expiration was imminent, despite the historical practice (or how Bowie had just conducted negotiations at Frontier and American Red Cross), the Union did not offer any additional dates. Knowing the contract was expiring, the Union refused to meet for almost three weeks. Rather than displaying any urgency related to the contract expiration, as she had just done in both the Frontier and American Red Cross negotiations, Bowie told Tomasello that the August 31 expiration date was just “an arbitrary date that was not a date of significance to the Union.” (Tr. 58-59, 98-99) In stark contrast to the Frontier and American Red Cross negotiations conducted by Bowie, at no point during the eight months of RN negotiations has the Union ever:

- offered to meet on consecutive days
- offered to meet more than one day in any one week

(Tr. 327)

Nor did Bowie or the Union ever take the initiative and voluntarily offer any bargaining dates without having been asked, or prompted to, by Tomasello.<sup>10</sup> This record in the St. Joseph Campus negotiations stands in stark contrast to how Bowie has conducted negotiations with other employers since May of 2015.

As described earlier, Bowie was negotiating contracts with Frontier and the American Red Cross in May, June and July of 2015. The Frontier contracts expired in June. Before the Frontier contracts expired, Bowie set up the following bargaining schedule:

May 4, 5, 6 and 7	May 11, 12, 13 and 14	May 18 and 19
May 26, 27 and 28	June 1, 2, 3, 4 and 5	June 11 and 12
June 16 and 17		

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<sup>10</sup> On at least two occasions, Bowie failed to give additional bargaining dates to Tomasello when dates were available. (Tr. 308-311, 319-321; C.P. Ex. 6)



Then, after the Frontier contracts expired, agreed to the following bargaining schedule:

July 2	July 10	July 13, 14 and 15
July 21, 22 and 23		

(Tr. 306-311; C.P. Ex. 6)

The American Red Cross contract had already expired. Therefore, Bowie had the following bargaining schedule:

June 22, 23, 24, 25 and 26	June 30	July 1
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(Tr. 309; C.P. Ex. 6)

Thus, in the two and one-half months of bargaining with Frontier that we have a record of, Bowie agreed to 30 bargaining dates. In eight months at St. Joseph Campus, Bowie has offered 18 dates. Bowie repeatedly scheduled consecutive dates with both Frontier and American Red Cross, 11 times in those three months. And, on two occasions, five consecutive days in a week. (Tr. 306-311; C.P. Ex. 6) Bowie never offered St. Joseph Campus consecutive days or more than one day in any week. (Tr. 327) Unlike both the Frontier and American Red Cross negotiations, where Bowie readily admitted a sense of urgency to complete those negotiations (Tr. 310), Bowie displayed only indifference to, and intentional avoidance of, her duty to bargain with St. Joseph Campus.

Bowie's conduct in the bargaining sessions as it relates to schedule dates for bargaining and unilaterally dictating and determining the length of each session is instructive.

#### **1. June 29, 2015 Bargaining Session**

At the first bargaining session, Tomasello expressed concern about the Union's unwillingness to meet in July and the impact this would have on reaching agreement before expiration. Bowie stated the Union had no availability in July due to her bargaining schedule and

committee members' vacation plans. Tomasello suggested that if Bowie was unavailable, the Union should use a different negotiator. Tomasello also stated that committee members' vacations should not prevent the parties from bargaining and meetings should be held without them.<sup>11</sup> Bowie simply said the Union had the right to choose its bargaining team and rejected Tomasello's suggestion. (Tr. 53, 139)

Later that day, Tomasello again asked for additional bargaining dates, telling the Union that the lack of bargaining dates would prevent the parties from reaching an agreement prior to expiration. Bowie denied the request for more bargaining dates and responded that if the parties were reasonable, they could reach agreement prior to expiration. Bowie then stated that she had finished other negotiations in fewer sessions than this. (Tr. 53, 139-140)<sup>12</sup>

Early in the day on June 29, after the first request by Tomasello for additional bargaining dates, Tomasello said the Hospital's bargaining committee would arrive by 8:00 a.m. each day of bargaining, could start whenever the Union was ready and was prepared to bargain into the evening. Bowie responded that the Union would arrive at 9:00 a.m. and try to be ready to meet by 9:30 a.m. but, that the Union would only meet until 5:00 p.m. (Tr. 53, 141, 225, 294-295)<sup>13</sup>

There were two sessions, or face-to-face meetings, on June 29. (G.C. Ex. 7) The second session started at approximately 3:45 p.m. The Hospital was presenting a number of proposals.

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<sup>11</sup> As McDonald testified, vacation conflicts had not prevented the CWA from proceeding with negotiations in the past. The meetings simply continued without that person. (Tr. 107-108, 153-154)

<sup>12</sup> Bowie made these statements to Tomasello knowing they were not true, in an attempt to mislead the Hospital. Bowie testified on cross-exam that the 2015 negotiations would not be easy. (Tr. 325-326) Despite her actual feelings and assessment, Bowie told Tomasello there should be no problem reaching an agreement prior to expiration using only the four dates they had scheduled for August.

<sup>13</sup> Bowie conceded that despite the Hospital offering to start negotiations earlier each day and continue meeting into the evening that she unilaterally determined what the bargaining schedule would be. (Tr. 294-295)

At 4:10 p.m., as Tomasello was explaining a proposal, Bowie then stood up and said she had to leave to catch a flight. (Tr. 54, 117)<sup>14</sup>

No negotiations or communications related to the negotiations occurred between June 29 and August 5.

On June 29, the parties met face to face twice for a total of one hour, fifty minutes. (G.C. Ex. 7)

## **2. August 5, 2015 Bargaining Session**

At the August 5, 2015 meeting, Tomasello again asked for more bargaining dates in August. (Tr. 56, 318-319) Bowie said she did not have any other dates available. (Tr. 56)

On August 5, the Hospital bargaining committee returned to the negotiation room at about 4:50 p.m. to provide responses and proposals. Then, in a repeat of the experience on June 29, a few minutes before 5:00 p.m., while Tomasello was explaining a proposal, Bowie stood up, said she had another appointment and left the room. The meeting ended when Bowie walked out. (Tr. 56-57, 140)

On August 5, the parties met face to face three times for a total of two hours, thirty minutes. (G.C. Ex. 7)

## **3. August 12 Bargaining Session**

At the third bargaining session, held on August 12, 2015, Tomasello asked for more bargaining dates, noting that there were only three scheduled dates left before expiration. Tomasello said the Hospital would “clear its calendar” because their goal was to reach an agreement. Bowie said she would look at her calendar. (R. Ex. 3 for August 12 at p. 13)

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<sup>14</sup> Bowie claimed that she told the Hospital early that day that her flight was at 5:30 and had to leave early. (Tr. 211-212) Tomasello disputed that, stating that Bowie had only said she had to fly out that night, and did not say she would be leaving early. (Tr. 117) The Union’s bargaining notes support Tomasello. The notes for June 29 show that Bowie said “leaving tonight for DC.” (R. Ex. 3 for June 29 at p. 1)

Later that day, the Hospital bargaining committee went back to the negotiation room at approximately 4:30 to respond to Union proposals and present additional proposals. For the third consecutive meeting, while Tomasello was presenting the Hospital's proposals, Bowie interrupted Tomasello and prematurely ended the meeting. (Tr. 119) This time, Bowie grabbed her cell phone, stood up and said she had to take a call and abruptly left the room. Tomasello asked the remaining Union bargaining committee members if they would keep bargaining. The response was "no" the meeting was over because Bowie was gone. (Tr. 57)

On August 12 the parties met face-to-face three times for a total of two hours, forty-five minutes. (G.C. Ex. 7)

#### **4. August 19 Bargaining Session**

At the August 19 session, Tomasello told the Union she was still concerned as they were now only 12 days from contract expiration, they only had two more dates scheduled, August 26 and 31 and there was not enough time to reach an agreement by August 31. Bowie asked Tomasello what she meant by August 31. Tomasello said that's the date that the contract expires. Bowie said that is not a date of significance to the Union. Tomasello reminded Bowie that on June 29, Bowie said that there should not be a problem reaching an agreement by the expiration date. Bowie responded that August 31 was just an arbitrary date that was not a date of significance to the Union and that the Union was not working to that date. Despite Tomasello offering again to clear her calendar, Bowie did not offer any additional dates. (Tr. 58-59, 98-99, 141)

Later that day, Tomasello said the Hospital would stay as long as they needed to continue negotiations. Bowie said the Union was leaving at 5:00. The negotiations ended at 5:00 p.m. (Tr. 58-59)

On August 19, the parties met face to face two times for a total of one hour, fifteen minutes.  
(G.C. Ex. 7)

## **5. August 24, 2015 Communications**

Based on Bowie's refusal to agree to any additional bargaining dates in August, Tomasello sent an email to Bowie on August 24 asking for all of the Union's available dates in September. Bowie responded via email the same day, explaining that she filed a petition for an election with the NLRB and was waiting to hear back on the election date. Bowie said she should have the election date the following day. Bowie said that when she knew the election date, she would communicate her availability to Tomasello. (Tr. 59-60; G.C. Ex. 8)

Bowie testified that she received the stipulation, and the election date, on or about August 24. (Tr. 303-304) Bowie admitted that, despite the commitment she made in her August 24 email to Tomasello, when she knew the election date she did not call Tomasello with her dates of availability in September. (Tr. 304)

## **6. August 26, 2015 Bargaining Session**

At the August 26 meeting, Tomasello referred to the August 24 email exchange on September bargaining dates and asked Bowie for dates in September. Bowie said she was still waiting for the stipulated election agreement from the NLRB with the date of the election and could not offer dates then but should have dates later that day. (Tr. 60, 142)<sup>15</sup> Bowie did not provide any bargaining dates for September at the August 26 meeting.

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<sup>15</sup> Obviously, what Bowie told Tomasello at the August 26 bargaining meeting was inconsistent with her testimony that she received the stipulation, with the election date on or about August 24. The election timeline also belies Bowie's statement at the August 26 meeting that she still had not received the stipulation and election date. Bowie testified on cross-exam that this election occurred on September 10, 2015. (Tr. 301; C.P. Ex. 6) If the stipulation was agreed to on August 27 or later, it is extremely unlikely that the election could have occurred as soon as September 10. September 10 is 14 days after August 27. Even under the new NLRB election rules such a short time period was not probable or likely.

On August 26, the parties met only one time, from 11:00 a.m. to 1:30 p.m. The parties then caucused so that each side could work on proposals. At about 4:45 p.m., Bowie sent a text to Tomasello stating that the Union was ready. Tomasello texted back saying that the Hospital's team was making copies of proposals. At about 5:00 p.m., the Hospital's bargaining committee left their room for the short walk to the negotiation room. As they were walking to the Union's room to present their proposals, Bowie called Tomasello and told her that the Union was done and leaving for the day. (Tr. 60-61, 142)<sup>16</sup>

On August 26, the parties met face to face one time for two hours, thirty minutes. (G.C. Ex. 7)

#### **7. August 27, 2015 Communication**

On August 27, Tomasello sent another email to Bowie asking for bargaining dates in September. Tomasello added that the Hospital would clear its calendar to negotiate in September. (Tr. 59-60; G.C. Ex. 8) Bowie did not respond to this email. Bowie never communicated with Tomasello that she knew the election date to provide Tomasello with her open dates in September. (Tr. 99-100, 302, 304)

#### **8. August 31, 2015 Bargaining Session**

The contract expired at the end of the day on August 31, 2015. Despite the imminent expiration, the Union had not provided the Hospital with any of its economic proposals and, had not even made all of its non-economic language proposals. (Tr. 152, 323)

Near the end of the morning session on August 31 Tomasello stated that the contract was expiring that night and they did not have any additional dates set for bargaining. Bowie said she

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<sup>16</sup> Bowie did not deny this. Rather, on cross-examination, Bowie said "I think someone on our committee had some appoint (sic) or something. . ." (Tr. 293) What Bowie could not, and did not, explain is why she texted Tomasello at 4:47 p.m. saying the Union was ready if she knew that the Union would be leaving at 5:00 p.m.? Once again, Bowie's behavior and after the fact explanation are disingenuous.

could offer September 17 and 28. This surprised Tomasello, based not only on the historical practice between the parties of meeting immediately after expiration if the parties went beyond expiration and because of Bowie's comments a week earlier about the upcoming NLRB election. (Tr. 38, 42, 61-62, 97)<sup>17</sup>

Tomasello repeated her request for dates sooner than September 17. Bowie simply said she was not available. (Tr. 62; R. Ex. 3 for August 31 at p. 16)

Later that day, Tomasello again asked Bowie for dates before September 17. Bowie again said she was not available. Tomasello then said she would email proposals to Bowie so that the Union could review them before the next meeting and be ready to respond at the September 17 meeting. Bowie said she had no time to review proposals before September 17 and could not do anything until September 17. (Tr. 62, 143; R. Ex. 3 for August 31 at p. 27) Tomasello then restated that the contract would expire at the end of the day, that the Hospital was prepared to stay late, and asked the Union to stay. Bowie said "no," that they would be leaving for the day. The Union walked out at 5:30 p.m. (Tr. 62; G.C. Ex. 7)

On August 31, the expiration date, the parties met face-to-face twice, for a total of two hours, forty-five minutes. (G.C. Ex. 7)

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<sup>17</sup> Bowie's storyline to Tomasello had been that she could not commit to any dates in September until she knew the date of the NLRB election. (Tr. 59-60, 298-299; G.C. Ex. 8) One would expect that Bowie was telling other employers the same – that she could not commit to any September dates until she knew the election date. But, on cross-exam, Bowie said the opposite. Bowie said that she did schedule other dates on her calendar and claimed that if the election date conflicted with a scheduled date, she would cancel the other commitment. (Tr. 299-300) Either way, Bowie was treating the Hospital differently than every other employer or person who wanted to schedule time with Bowie in September. She made scheduled commitments for others but refused to do so for St. Joseph Campus. She used the election as an excuse with the Hospital but not with any other employer. Rather than refuse Tomasello's plea for September dates with the election excuse, Bowie could easily have scheduled multiple dates early in September for bargaining and told Tomasello that she may have to cancel a date if the election was scheduled for that day. Bowie simply did not want to schedule bargaining dates with the Hospital.

## **9. September 17, 2015 Bargaining Session**

On September 17 the parties met for the first time since the contract expired. During this meeting Tomasello told Bowie that Region 3 had decided to issue a complaint on the ULP charge filed by the Hospital. Tomasello further stated that the Union was delaying the negotiations. (R. Ex. 3 for September 17 at p. 20) Later that day Tomasello asked for more bargaining dates in October and November, specifically requesting to meet multiple times each week. (Tr. 63, 143) Bowie rejected the request, stating that if the Hospital wanted more bargaining dates it would have to settle outstanding grievances. (Tr. 100, 143-144)

As the second session was ending, Tomasello said that there was some momentum and that they should continue negotiating into the evening. Bowie rejected the request, stating that the Union was leaving. (Tr. 63-64; R. Ex. 3 for September 17 at p. 26)

On September 17, the parties met face-to-face two times for a total of four hours, fifteen minutes. (G.C., Ex. 7)

## **10. September 28, 2015 Bargaining Session**

At the September 28 meeting, four weeks after the contract expired, the Union made its first economic proposals, and these proposals only addressed wages. (Tr. 152, 323; R. Ex. 3 for September 28 at p. 2) The Union also inexplicably proposed a one year contract. (Tr. 334)<sup>18</sup>

During that meeting, Tomasello commented that the Union had only agreed to meet twice in September and they had no other dates scheduled. She asked Bowie for bargaining dates. Despite Tomasello's request in the September 17 meeting for dates in October and November, Bowie said the Union could meet on October 13 and 30. Tomasello expressed concern about the slow pace and repeated what she had at virtually every other meeting — that the Hospital would

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<sup>18</sup> Since Bowie started negotiating contracts in 2009, every contract at a CHS Hospital has been for three or four years. (Tr. 334) Bowie did not offer any explanation why the Union was proposing a one year contract.



clear its calendar. She asked for more dates because they needed to meet more often and this was not how negotiations had been conducted in the past. Bowie did not offer any other dates. (Tr. 64, 144; R. Ex. 3 for September at p. 25)

Tomasello then asked the Union to stay later. Bowie denied the request, saying the Union was finished for the day. (Tr. 64)

On September 28, the parties met face to face twice for a total of three hours, five minutes. (G.C. Ex. 7)

#### **11. October 2015 Communications for Bargaining Dates**

On October 6, Tomasello sent an email to Bowie, stating that meeting once every two weeks was not acceptable, particularly when the contract expired a month earlier. Tomasello told Bowie the Hospital was available on ten days between October 13 and 30 and would meet on any or all of those dates. (Tr. 65; G.C. Ex. 11) When Tomasello did not receive a response to the October 6 email she sent a follow-up email on October 16 asking to meet two times each week in November. (Tr. 69; G.C. Ex. 10)

Bowie failed to respond to the October 6 and 16 emails until October 20. In her October 20 emails, Bowie stated that she was not available for any of the dates in October offered by Tomasello in her October 6 email. Bowie stated she would get dates for November. (Tr. 65, 69; G.C. Exs. 10, 11) On October 26, having received no response from Bowie on November bargaining dates, Tomasello sent another email to Bowie proposing 12 specific dates in November. Bowie did not respond to this email. (Tr. 69; G.C. Ex. 10)

#### **12. October 13, 2015 Bargaining Session**

As noted above, Tomasello sent Bowie an email on October 6 requesting more bargaining dates and offering ten dates between the October 13 meeting and the October 31 meeting. Bowie

had not responded by October 13. During the October 13 meeting, Tomasello reminded Bowie of the October 6 email and asked for more dates in October. Bowie did not offer any additional dates. (Tr. 66) When Bowie refused to accept any of the ten dates Tomasello offered, Tomasello stated that the Hospital would clear its calendar to meet. Bowie did not offer any additional dates. (R. Ex. 3 for October 13 at p. 16) The session ended despite Tomasello's request to continue meeting into the evening. (Tr. 66, 145)

On October 13, the parties met face to face three times for a total of two hours, forty-five minutes. (G.C. Ex. 7)

### **13. October 30, 2015 Bargaining Session**

On October 30, an FMCS mediator, Mary Kluczycki, participated. A mediator has attended all bargaining sessions since October 30. (Tr. 70, 145) During a joint session that day, Tomasello became very frustrated and accused the Union of intentionally delaying the negotiations. Tomasello said she had heard that Union officials had discussed the Union's strategy to delay the negotiations. (Tr. 91-92; R. Ex. 3 for October 31 at p. 10) Bowie did not respond.

Later that day, after Tomasello requested bargaining dates for November, Bowie offered November 10 and 25. Those were two of the 12 dates proposed by Tomasello in her October 26 email to Bowie. (Tr. 70-71, 145-146) Tomasello then asked for more than those two days in November and that the Hospital would clear its calendar. Bowie claimed there were no other dates available. (Tr. 146; R. Ex. 3 for October 30 at p. 24)

Late in the day Tomasello asked if the Union would stay later. Bowie said no. The mediator then stated that since the parties agreed to mediation, they should be prepared to stay late, beyond 5:00 p.m. (Tr. 72; R. Ex. 3 for October 30 at p. 14)

On October 30, the parties met face-to-face three times, for a total of three hours. (G.C. Ex. 7)

#### **14. Bowie's October 31 Email to the Union Bargaining Committee**

The next day, Saturday, October 31, Bowie sent an email to her bargaining committees at both St. Joseph Campus and Kenmore Mercy hospitals. In this email, Bowie told the two committees that they need to set bargaining dates for December for each of the negotiations.<sup>19</sup> Bowie told the two committees that she had ten dates open in December and asked for their availability. (Tr. 319-320; C.P. Ex. 4) Despite knowing on November 2 that she had ten dates open in December, Bowie did not call Tomasello and offer those dates. (Tr. 320)<sup>20</sup>

#### **15. November 10, 2015 Bargaining Session**

At the November 10 meeting, the Hospital made a comprehensive proposal to address staffing. Bowie stated that the Hospital's proposal represented "significant movement in the right direction." Tomasello asked Bowie to review the proposal and respond. Bowie replied "no" that they were leaving for the day. This surprised and frustrated Tomasello because Bowie had stated at earlier bargaining sessions that the Union would stay late if they were making progress. Despite describing the Hospital's staffing proposal as "significant movement in the right direction," Bowie refused to review it and respond, choosing instead to end the session and leave. (Tr. 72-73)

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<sup>19</sup> At Kenmore Mercy the contract for the technical employees was scheduled to expire on November 30, 2015. Bowie and Tomasello started negotiating that contract in October. (Tr. 110, 320) When Bowie sent this email on October 31, how did she know then that the parties would not reach agreement on the Kenmore Mercy contract prior to the November 30 expiration date? Unless she "knew" that she would be delaying that negotiation just as she was at St. Joseph Campus.

<sup>20</sup> Despite what her October 31 email said, Bowie claimed the email was not intended to schedule bargaining dates at St. Joseph Campus. (Tr. 321) Judge Dawson immediately saw through what Bowie was trying to do, and corrected Bowie, quoting the October 31 email and noting that the committee members who responded thought Bowie was asking about bargaining dates as well. (Tr. 322) Bowie never explained why she did not call Tomasello and offer some or all of these dates.

Also, despite her October 31 email to the two hospital bargaining committees regarding bargaining dates in December, and knowing she had ten open dates in December, Bowie offered no December dates for bargaining at the November 10 meeting.

On November 10, the parties met face-to-face three times for a total of three hours, ten minutes. (G.C. Ex. 7)

#### **16. November 25, 2015 Bargaining Session**

In the October 30 session and in following sessions, both Tomasello and the mediator would ask Bowie for additional bargaining dates. (Tr. 70, 145) Going into the November 25 meeting, Bowie had not communicated with Tomasello about Bowie's open schedule for December, or otherwise offer any dates. (Tr. 320)

At the November 25 meeting, after earlier requests from Tomasello, Mediator Kluczycki told Tomasello that the Union offered two dates for bargaining in December — December 7 and 23. (Tr. 73-74) For the first time, Tomasello did not immediately accept the dates offered by Bowie. On prior occasions if Tomasello had a conflict with dates offered by Bowie, Tomasello would cancel the other meeting or rearrange her schedule so that she could bargaining on the dates offered by Bowie. This time, the two dates offered by Bowie were dates of mandatory Catholic Health yearend meetings. Tomasello talked to Bowie, explained that she had mandatory meetings on those two days, that Tomasello had rearranged her schedule in the past to accommodate the dates offered by Bowie and asked if Bowie could offer dates other than December 7 and 23. Bowie rejected Tomasello's request, stating that if Tomasello was not free on those two dates there would be no bargaining in December. Hearing this, Tomasello received permission to miss the yearend

meetings. Tomasello then told Bowie that she could accept the dates of December 7 and 23. (Tr. 73-74)<sup>21</sup>

The session ended early that day, shortly after 4:00 p.m. when the mediator told Tomasello that the Union was done for the day and had left. (Tr. 73)

On November 25, the parties met face to face twice for a total of one hour, fifteen minutes. (G.C. Ex. 7)

#### **17. December 7, 2015 Bargaining Session**

The December 7 session was very short. The parties met face-to-face one time for one hour, fifteen minutes in the morning. At approximately 4:30 p.m., the mediator told Tomasello that the Union had nothing to propose and was leaving. (Tr. 75-76)

#### **18. December 8, 2015 Request for Bargaining Dates**

Having experienced Bowie's tactics for the St. Joseph Campus RN negotiations, Tomasello had no confidence that a new contract would be agreed to at the December 23 meeting or, in January 2016. Tomasello had recently learned that Bowie would be out of the country, on vacation in Burma, from December 25 through February 1. CWA District 1 Area Director Debora Hayes would be filling in for Bowie while Bowie was on vacation. (Tr. 113) There were no bargaining dates scheduled for January or February of 2016.

Tomasello sent an email to Bowie on December 8 requesting dates for bargaining in January and February 2016. Tomasello asked for all available dates and stated that the Hospital

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<sup>21</sup> This exchange between Tomasello and Bowie serves to highlight Bowie's intentional indifference to her duty to bargain in good faith or the steps that Bowie was willing to take to insure that the negotiations were delayed. As described earlier, Bowie knew on October 31 that she had ten open dates in December. By her own admission, she did not communicate this to Tomasello. (Tr. 320) Rather, Bowie waited three and one half weeks before she offered any dates for December, and then offered only two dates.

was available for all but four days those two months (with one of those days being the New Year's Day holiday). (Tr. 75-76; G.C. Ex. 12) Bowie did not respond to this email. (Tr. 76)

#### **19. December 23, 2015 Bargaining Session**

Since Bowie had not responded to Tomasello's December 8 email requesting bargaining dates in January and February 2016, Tomasello renewed her request at the December 23 meeting, and asking that if Hayes was covering for Bowie in January, why hadn't there been any communication? Tomasello then asked whether Hayes was available the last week in December. Bowie said she had to talk to Hayes. (Tr. 77)<sup>22</sup> Tomasello then provided Bowie with a list of ten dates in January and eleven days in February that the Hospital was available. (Tr. 78, 121; G.C. Ex. 14)

Later in that session Bowie told Tomasello that Hayes was available on January 6 and 28. Then, for the first time since the contract expired, Bowie offered three dates in February 2016, February 11, 18 and 23. (R. Ex. 3 for December 23 at p. 2). Interestingly, none of these five dates were among the dates that Tomasello had earlier offered. (Tr. 121; G.C. Ex. 14) But, as Tomasello had repeatedly done, she rearranged her schedule to take the two January dates and February 11. Tomasello was not available on February 18 or 23. (Tr. 121-122)

The parties met face-to-face three times on December 23 for a total of two hours. (G.C. Ex. 7)

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Bowie had informed Tomasello that she was going on vacation and Hayes would fill in for her. Tomasello sent an email on December 8 requesting bargaining dates in January and February 2016. Tomasello asked Bowie to forward the email to Hayes. (G.C. Ex. 12) Bowie did not respond to that email. Bowie must have known Tomasello would request bargaining dates at the December 23 meeting. Despite this knowledge or, perhaps in spite of this knowledge, Bowie told Tomasello at the December 23 meeting that she still needed to talk to Hayes about bargaining dates. (Tr. 77) Bowie's behavior represents the antithesis of good faith.

## **20. January 4, 2016 Communications**

On January 4, 2016 Deb Hayes sent an email confirming the two January bargaining dates at St. Joseph Campus. In this email Hayes also asked that the January 6 meeting start at 10:00 a.m. but that the Union would stay late, until 6:00 p.m. to make it up. Tomasello emailed back to Hayes confirming the dates. (Tr. 78-79; G.C. Ex. 13)

## **21. January 6, 2016 Bargaining Session**

In its brief, the Union claims that when Bowie went on vacation, the Union replaced her with Deb Hayes, who “has a lot more bargaining experience than Ms. Bowie.” (R.B. 23-24) On January 6, Hayes filled in for Bowie. Despite Bowie’s earlier commitments to Tomasello that Bowie would get Hayes prepared to fill in for her, Hayes was not familiar with the issues and appeared unprepared. (Tr. 80, 113)<sup>23</sup>

Most of that meeting on January 6 was taken up with Hayes reviewing a list of information requests that Bowie had left for her. Hayes did not know the status of the requests and had to ask Tomasello. On many of the listed items, Tomasello told Hayes that Bowie had already made the request and the Hospital had provided the information. (Tr. 80, 114) While Hayes may have had more experience than Bowie, it did not matter as Hayes was completely unprepared.

There were a number of new information requests presented by the Union asking for a lot of information and documents. Tomasello said it would take a lot of time to collect the data. The parties caucused at 12:15 p.m. to allow the Hospital to gather the information. Later that afternoon,

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<sup>23</sup> Bowie claimed that she met with Hayes to get Hayes up to date on the negotiations. (Tr. 235) This is inconsistent with what Hayes told Tomasello at the January 6 meeting. At that meeting, Hayes told Tomasello that Bowie had left a list for Hayes but that Bowie did not even indicate whether an item had been requested or addressed by the Hospital. (Tr. 114)

Hayes talked to Tomasello in the hallway, asking Tomasello to review the Union's proposal on the on-call language, as Hayes wanted to resolve that issue that day. (Tr. 80)

At approximately 4:30 p.m. after reviewing the on-call issue and gathering the requested information, Tomasello sent a text message to Hayes, telling her that the Hospital was ready and would come down. Hayes texted back, stating that the Union had already left for the day. (Tr. 81,115, 147)<sup>24</sup> As Judge Dawson noted, the Union left early on the very day that Hayes had said the Union would stay late to make up for the late start. (Tr. 81)

On January 6, the parties met one time for a total of two hours, fifteen minutes. (G.C. Ex. 7)

## **22. January 11, 2016 Communications**

Based on the complete lack of progress at the January 6 meeting, Tomasello sent an email to Hayes on January 11, providing Hayes with the list of dates that Tomasello had proposed to Bowie at the December 23, 2015 meeting. This listing included ten dates in January and eleven dates in February. This would be in addition to the two dates that were scheduled, January 28 and February 11. (Tr. 78; G.C. Ex. 14)

Hayes responded the same day, stating that she had no availability in January and that Tomasello would have to wait until Bowie returned from vacation on February 2 to schedule February dates. (Tr. 78; G.C. Ex. 14) Tomasello emailed back to Hayes renewing the request and correcting Hayes' mistaken belief that February 23 was a scheduled date. (G.C. Ex. 14) Hayes did not respond to this email. (Tr. 81)

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<sup>24</sup> The Union tried to minimize this impromptu walk out by the Union's bargaining committee by claiming that they had waited for two hours before leaving. (R.B. 24-25; Tr. 116) Tomasello completely negated the Union's attempted mitigation by pointing out that two hours was a relatively short caucus and that at the January 28, 2016 meeting, the Hospital waited five hours for the Union. (Tr. 116; G.C. Ex. 7)



**23. January 28, 2016 Bargaining Session**

At the January 28 meeting Tomasello and Hayes confirmed the February 11 bargaining date. When Tomasello asked for more dates in February, Hayes repeated what she said in the January 11 email – that Tomasello would have to wait until Bowie returned from vacation. (Tr. 81-82) At the January 28 meeting, the mediator said she was available to meet the next day, January 29 and February 5. Tomasello said the Hospital would make itself available. Hayes said that the Union was not available either day. (Tr. 147-148)

Tomasello also asked Hayes to stay later that day. Hayes agreed to do so, saying she would stay until 6:30 or so. The Hospital had been working on proposals and returned to the negotiation room at 6:25 p.m. Tomasello began explaining the package of proposals. Ten minutes after the meeting started, Hayes and the Union bargaining committee stood up, Hayes said they were done for the day and then they left. (Tr. 82)

**24. Bowie's Return from Vacation and Scheduling of Bargaining Dates for the Mercy Negotiations**

Bowie returned to work on February 2, 2016. However, despite Hayes' commitment to Tomasello that Bowie would respond to Tomasello's request for additional bargaining dates in the St. Joseph Campus RN negotiations when Bowie returned to work, Bowie did not do so. (Tr. 81-82; G.C. Ex. 14) However, a few days after Bowie returned from vacation she called Tomasello to set up a bargaining schedule for the Mercy Hospital negotiations. Bowie proposed starting in March and meeting twice each week during the months of March, April and May. Bowie then said that they could add dates in May as they neared the June 3, 2016 expiration date. Tomasello accepted Bowie's proposed schedule. (Tr. 82-83, 101-103, 127-128, 323)

During this conversation Bowie did not offer any dates for the RN negotiations at St. Joseph Campus. (Tr. 103, 323)

## **25. February 11, 2016 Bargaining Session**

Since Bowie had returned from vacation, she returned to the Union bargaining team and replaced Hayes. (Tr. 84) Hayes had said in January that Tomasello would have to wait until Bowie returned from vacation to schedule more dates for the St. Joseph Campus RN negotiations. (Tr. 82; G.C. Ex. 14) During the very short time the parties met on February 11, they discussed bargaining dates. Tomasello said that the Hospital could meet on February 15, 17, 18, 19 and 22.<sup>25</sup>

Bowie refused to meet on February 15 and 18 because the mediator was not available. Bowie said she was not available on February 17. (Tr. 84-85) Bowie then said she would not attend the arbitration on February 19 and schedule bargaining. Tomasello told Bowie there was no arbitration on February 19. Bowie conceded that she was mistaken and agreed to meet on February 19. (Tr. 121-122)

The parties met face-to-face one time on February 11 for a total of twenty minutes. (G.C. Ex. 7)

## **26. February 19, 2016 Bargaining Session**

Tomasello did not attend this session and was replaced by Pietraszewski. (Tr. 85-86) During this session Pietraszewski asked for bargaining dates in March and April. Bowie offered March 14, 18 and 21 and April 27. Pietraszewski accepted these four dates and asked for more. Bowie claimed she had no other dates to offer. (Tr. 149-150) Then, at 2:30 p.m. Bowie stood up, announced that she had just received a subpoena (for this trial) and was leaving for the day. The Union bargaining committee left with her. (Tr. 150-151)

On February 19 the parties met face-to-face twice for a total of thirty minutes. (G.C. Ex. 7)

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<sup>25</sup> Tomasello was not available on February 19. But, Catholic Health hired Diane Pietraszewski in January as Director of Labor Relations. Tomasello told Bowie that Pietraszewski would cover for her on February 19. (Tr. 85-86)

At each bargaining session — and frequently between bargaining sessions — Tomasello requested more bargaining dates. Despite Tomasello repeatedly offering to “clear the calendar,” Bowie consistently denied requests for additional meetings. True to the CWA’s October handbill, Bowie refused to offer more than two days for bargaining in any month after the contract expired, regardless of her availability. This pattern followed Bowie’s refusal to meet at all in July 2015.

These facts fully support the Judge’s Decision.

### **ARGUMENT**

Section 8(d) of the Act requires both employers and unions to bargain in good faith. In defining this obligation, Section 8(d) states:

to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment,

29 U.S.C. 158(d). Thus, the Act requires employers and unions “to meet at reasonable times.” For almost 70 years the Board and courts alike have found a violation of the statutory duty to bargain in good faith when a party fails to meet with reasonable frequency and promptness in the negotiation of a contract. *“M” System, Inc., Mobile Home Division Mid-States Corporation*, 129 NLRB 527, 548-549 (1960); *J.H. Rutter-Rex Manufacturing Company, Inc.*, 86 NLRB 470, 506-507 (1949).

As the Board held in *J.H. Rutter*, *supra*,

The obligation to bargain collectively surely encompasses the affirmative duty to make expeditious and prompt arrangements, within reason, for meeting and conferring. Agreement is stifled at its source if opportunity is not accorded for discussion or so delayed as to invite or prolong unrest or suspicion. It is not unreasonable to expect of a party to collective bargaining that he display a degree of diligence and promptness in arranging for collective bargaining sessions when they are requested, and in the elimination of obstacles thereto, comparable to that which he would display in his other business affairs of importance.

86 NLRB 470 at 506.

The Board has also held that this inquiry into whether a party has satisfied its duty to bargain “to meet at reasonable times” does not end with a review of the number or schedule of meetings. The analysis can go much deeper. Thus, in *Exchange Parts Company*, 139 NLRB 710 (1962), enf’d 339 F.2d 829 (5th Cir. 1965), the Board stated:

We are not prepared to say, nor need we determine here, that any specific schedule of meetings, standing alone, would or would not discharge the duty imposed upon the parties by statute. For meetings do not occur in the abstract but are the result of efforts put forth by the parties. A given schedule would not reflect the amount of effort required, and by whom, to secure the meetings, or the degree of cooperation or resistance encountered. Nor would it indicate the amount of time and frequency of meetings necessary to resolve the problems with which the parties were confronted. Thus, the schedule of meetings held is material to the question of whether there has been a breach of the obligation to bargain collectively, but its significance is dependent upon the entire context.

139 NLRB 710, at 711-712.

When determining whether a party has satisfied its statutory obligation “to meet at reasonable times,” the Board does not apply a different analysis, or otherwise differentiate between an employer and a union. The Board has consistently held that:

Since the requirements of Section 8(b)(3) parallel those of Section 8(a)(5), the obligations imposed on employers in cases arising under Section 8(a)(5) are equally applicable to labor organizations in cases arising under Section 8(b)(3).

*Teamsters Local Union No. 122, International Brotherhood of Teamsters, AFL-CIO*, 334 NLRB 1190, 1248 (2001). *See also, Local Union #612, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 215 NLRB 789, 791 (1974).

**A. THE JUDGE CORRECTLY FOUND THAT THE UNION FAILED TO MEET AT REASONABLE TIMES**

The RN contract expired on August 31, 2015 and the negotiations are ongoing. (Tr. 149-150; G.C. Ex. 2, at p. 83) In the eight months of bargaining, from June 29, 2015 through March 1, 2016, there have been 18 negotiation meetings. (Tr. 46, 137, 189) On these 18 days the parties have negotiated face-to-face for a total of less than 37 hours. This is an average of about two hours

on each day. In the six months since the contract expired, the Union has offered to bargain exactly two days each month. Had the Hospital not cleared its calendar and accepted the dates offered by the Union, bargaining would not have occurred.

It is also abundantly clear that the Union offering only two bargaining dates each calendar month after the contract expired was no mere coincidence based on Bowie's availability. Based on Bowie's testimony and a Union document, there can be no doubt that the Union decided, most likely in August 2015, that its strategy was to offer exactly two bargaining dates each calendar month — no more and no less — with absolutely no flexibility in those dates.

On cross-exam, Bowie testified that after the Hospital filed the first ULP charge she had discussions with the Union's attorney on scheduling dates. (Tr. 327) Then, in October 2015 the Union published and distributed their Negotiations Update #7 regarding the St. Joseph Campus RN negotiations. This Negotiations Update #7 was distributed at many of the Catholic Health owned hospitals as a handbill/flyer. In this Negotiations Update #7 the Union first discusses the ongoing RN negotiations at St. Joseph Campus. Then, the Union gives employees an update on the first ULP charge filed against the Union by the Hospital. The Union states:

The labor board also said the Union should have scheduled one or two days of negotiations back in July even though vacation schedules and ongoing Red Cross negotiations made that impossible. Since then, the Union has scheduled at least two sessions each month and will continue to do so until we reach a contract settlement that is good for employees and good for our patients.

(Tr. 67-69; G.C. Ex. 9)

When this Negotiations Update #7 is viewed in conjunction with the Union's actual conduct, there can be no doubt that the Union predetermined its bargaining schedule and dictated it to the Hospital, regardless of Bowie's availability.

A prime example of this occurred in late October 2015. At the October 30 bargaining meeting, in response to a request from Tomasello, Bowie offered two dates in November. The

next day, October 31, Bowie sent an email to her bargaining committees in the St. Joseph RN negotiations and the Kenmore Mercy technical employee negotiations, informing them that she had ten open dates in December. Despite knowing that she had these ten open dates in December, Bowie:

- did not offer any December dates to Tomasello in the October 30 meeting, and
- did not call Tomasello in November to offer these December dates, and
- did not offer any December bargaining dates at the November 10 meeting, and
- waited over three weeks until after Tomasello and the mediator asked for December dates at the November 25 meeting, to offer any dates, and
- offered only two bargaining dates in December.

(Tr. 70, 73-74, 145, 319-320; C.P. Exs. 4, 5)

Bowie had no excuse. Indeed, on cross-examination, when Bowie realized she had been “trapped” she actually said that her October 31 email had nothing to do with scheduling bargaining dates at St. Joseph Campus. (Tr. 321) Upon hearing this, the ALJ immediately interceded, correcting Bowie, noting that in responsive emails, committee members also thought Bowie was asking to schedule bargaining dates in December. (Tr. 321-322) Bowie did not try to explain her failure to call Tomasello early in November with bargaining dates in December.

The Union simply argued that since the Board has not stated a bright line standard for meeting dates, it cannot be found to have violated the law. The Union’s argument is ludicrous. Taken to its logical conclusion it would negate Section 8(d) simply because no hard and fast standard exists.

Despite the Union’s protestations, the Board has found a violation of the duty to meet at reasonable times when a party has agreed to meet approximately two times per month. In *Garden Ridge Management, Inc.*, 347 NLRB 131 (2006), the parties had 20 bargaining meetings over 11 months. The parties met about every three weeks. The employer refused the Union’s request for

more bargaining dates on eight separate occasions. The Board found that the employer violated its duty to meet at reasonable times. The ALJ first concluded that:

Respondent did not provide any credible explanation as to why it could not have met more frequently than twice a month. Similarly, it provided no explanation regarding why it could not, as the Union requested, meet on consecutive days.

The duty to bargain in good faith does not require a party to meet any preordained number of times, such as once a week, or twice a week, or every day. Rather, the law requires the party to meet at reasonable times, and what is reasonable will depend on the circumstances. When an existing bargaining schedule proves inadequate, reasonable negotiators agree to change it. Respondent would not.

Typically, parties will hold more bargaining sessions as they near agreement. Such a course is reasonable because parties also typically save the hard issues for last, and hard issues require more time. In the present case, Respondent did defer the difficult “economic” issues until later in the bargaining, yet the frequency of meetings did not increase. To the contrary, the parties met more often at the start of the process than when it ended.

(Emphasis added) 347 NLRB 131, at 146.

The Board then held that:

Section 8(d) of the Act requires that an “employer and the representative of the employees . . . meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . .” The Board considers the totality of the circumstances when determining whether a party has satisfied its duty to meet at reasonable times. *Calex Corp.*, 322 NLRB 977, 978 (1997), *enfd.* 144 F.3d 904 (6th Cir. 1998) (examining respondent’s “overall conduct”). Our inquiry is not limited to an examination of the number of bargaining sessions held. Here, on balance, we find that the Respondent violated its duty to meet at reasonable times.

We first acknowledge that the Respondent met with the Union on 20 occasions over 11 months and reached agreement on a host of issues. We also acknowledge that, as described below, the General Counsel failed to satisfy his burden of proving that the Respondent bargained in bad faith. However, despite the parties’ progress in negotiations, significant issues remained outstanding, and the Union made repeated requests in 2002 for more frequent bargaining sessions. The Respondent summarily refused each of these requests without explaining its unwillingness to the Union or the Board.

*Calex Corp.*, 322 NLRB 977, is instructive. In that case, the Board held that an employer violated its duty to meet at reasonable times even though it negotiated with the Union on 19 occasions over 15 months. When negotiations started, the

employer declared that it would meet only once per month. The Union repeatedly requested more frequent bargaining sessions, but the employer refused. The Board relied heavily on the employer's repeated refusals in finding that the employer violated the Act. Consistent with *Calex Corp.*, we rely heavily on the Respondent's repeated, unexplained refusals in finding that the Respondent violated its duty under Section 8(d) to meet at reasonable times.

347 NLRB 131, at 2-3.

In *Camelot Terrace*, 357 NLRB 1934 (2011), the employer met with the Union 21 times over nine months. On those 21 days, face to face bargaining totaled less than 60 hours, an average of three hours per session. Using the totality of circumstances, the Board found the employer violated the law.

*Teamsters Local Union No. 122*, supra, is instructive. There, the union displayed an unwillingness to respond to requests for meeting dates or to promptly schedule dates. In that negotiations, 49 meetings were held over a two year period – about two meetings per month. Over these 49 sessions, the face-to-face meeting time averaged about three hours per session. The employer frequently requested additional bargaining dates, which were denied. The employer also asked the union to stay late. The union refused. Meetings would end with no regard to whether progress was being made. The union made it difficult to schedule meetings. It only responded to employer requests, and did not initiate the scheduling of meetings.

The ALJ found that the “negotiations occurred with the consistency of a metronome, but at a pace designed to forestall agreement.” 334 NLRB 1190 at 1249. In finding that the union failed to meet at reasonable times, the ALJ explained:

Busch's repeated insistence on more frequent and lengthier meetings, and the variety of means by which it unsuccessfully sought to obtain them, make clear that Respondent controlled the scheduling of negotiations. During the first year of negotiations, Chief Negotiator Schmitz had Busch almost totally available to negotiate, offering extensive and consecutive dates for negotiations including nights and weekends. Chief Negotiator Telegen consistently offered blocks of a week or more for negotiations, usually offering dates months in advance to minimize schedule disruptions. Generally, Respondent simply refused, without



explanation, to engage in more frequent or lengthier negotiations. It simply cherry picked isolated, non-consecutive dates for negotiations from the vast array of dates offered by Busch. Claims such as the press of Domesick's business as a sole practitioner, his frequent claims of failing health or the demands on Murphy's time as a Respondent Union official, are simply not legally sufficient to forestall negotiations. *Nursing Center at Vineland*, supra, and cases cited therein. "Collective bargaining negotiations are entitled to the importance and attention of any other business affairs." *Eastern Maine Medical Center*, supra at 247.

334 NLRB 1190, at 1250.

Bowie's conduct in this case bears striking parallels to that in *Teamsters Local Union No.*

122. The Union is simply wrong when it states that Bowie satisfied the Union's statutory obligation to meet at reasonable times.

**B. THE JUDGE CORRECTLY HELD THAT BOWIE'S WORK SCHEDULE DID NOT MITIGATE, OR RELIEVE, HER DUTY TO MEET AT REASONABLE TIMES**

Throughout Bowie's testimony she repeatedly explained that she had a high volume of work (Tr. 221) and was bargaining all the time. (Tr. 225) Bowie also gave examples of other work obligations that prevented her from scheduling more bargaining dates with the Hospital. These included many arbitrations, each of which took up at least four full days to prepare for and then handle the hearing, and the multiple ULP charges filed against Catholic Health hospitals.<sup>26</sup> (Tr. 229-232)

Bowie also relied on her bargaining obligations at Frontier, American Red Cross and Crisis Services as an excuse. (Tr. 305-311)<sup>27</sup>

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<sup>26</sup> However, Bowie admitted on cross-examination that starting in 2015 she no longer handled arbitrations as the CWA decided to use attorneys for all arbitrations. Bowie also agreed that there were no arbitrations at St. Joseph Campus in 2015. (Tr. 324) Bowie's personal calendar for the period May 2015 through January 2016 also revealed that she scheduled no time at all for any of those ULP charges. (C.P. Ex. 6) That is not a surprise as those charges were all filed in 2014 and in the first six months of 2015. (R. Exs. 7, 8 and 9)

<sup>27</sup> On cross-examination, Bowie conceded that the Frontier and America Red Cross negotiations were completed in July 2015 and, that Crisis Services took only one half day of bargaining each week in September 2015. (Tr. 305-311; C.P. Ex. 6)

While the facts do not support Bowie's contention that these matters actually prevented her from scheduling more bargaining sessions with the Hospital, the Board has made it clear that even if Bowie's schedule truly prevented her from meeting with the Hospital, those other work commitments do not mitigate, or relieve, Bowie's obligation to meet at reasonable times.

Thus, in *People Care, Inc.*, 327 NLRB 814 (1999), the Board sustained the ALJ's conclusion that the employer failed to meet at reasonable times. There, the employer's attorney showed that his schedule was so busy it prevented the employer from meeting regularly. The ALJ concluded,

The Board has long held that "the busy schedule of [The Respondent's] attorney and chief negotiator . . . does not excuse the Respondent's obligation to bargain in good faith." *Lawrence Textile Shrinking Co.*, 235 NLRB 1178, 1179 (1978). In addition, the Board has found a violation in an employer's refusal to set times for future meetings and by delaying the scheduling of future meetings. *Lower Bucks Cooling & Heating*, 316 NLRB 16, 22 (1995).

327 NLRB 814, at 825.

In *Calex Corp.*, 322 NLRB 977 (1977), the employer used a labor consultant as its lead negotiator. The consultant repeatedly rejected requests for more meetings due to his schedule. In affirming the ALJ's finding that the employer violated 8(a)(5) and 8(d), the Board held:

the Respondent could not avail itself of the "busy negotiator" defense as an excuse for its failure to meet at reasonable times. In this regard, it is well settled that an employer's chosen negotiator is its agent for the purposes of collective bargaining, and that if the negotiator causes delays in the negotiating process, the employer must bear the consequences. See, e.g., *O&F Machine Products Co.*, 239 NLRB 1013, 1018-1019 (1978); *Barclay Caterers*, 308 NLRB 1025, 1035-1037 (1992).

322 NLRB 977, at 978.

This principle is equally applied to a Union's negotiator. In *Local Union #612*, supra, the Union's negotiator was out of town and unavailable due to his involvement in national negotiations with other employers. The Board agreed with the ALJ that the Union violated 8(b)(3) by failing to meet at reasonable times. In reaching his conclusion, the ALJ explained that:

for its failure and refusal to meet with the Company during this period rests on the fact that its representatives were preoccupied with negotiations on the national lever. However, the short answer to this is that a party to negotiations may not interpose a busy schedule as an excuse for failing to meet and confer at reasonable intervals. As the Board stated in *"M" System, Inc., Mobile Home Division Mid-States Corporation, supra*:

The record here quite clearly supports a finding that the Respondent, in arranging meetings with the Union failed to display the degree of diligence that proper performance of its bargaining obligations required. This is so whether or not the delays were inspired by a deliberate scheme to engage in dilatory tactics. One may sympathize with the problems of the Respondent's negotiator in fitting the negotiating meetings into the schedule of his busy law practice, but this provides the Respondent with no legal excuse for the consequent inordinately long delays tending to impair employee statutory rights. Labor relations are urgent matters too. If [counsel's] other activities made it impossible for him to devote adequate time to reasonably prompt and continuous negotiations, it was the Respondent's obligation to furnish a representative who could. The duty to bargain in good faith includes the duty to be available for negotiations at reasonable times as the statute requires. That duty is not discharged by turning over the conduct of negotiations to one whose other activities make him not so available. See, *Cummer-Graham Company*, 122 NLRB 1044; *Derenson's*, 104 NLRB 273.

I think it clear that the principle explicated above is applicable here.

215 NLRB 789, 791.

Finally, in *Teamsters Local Union No. 122, supra*, where the parties held 49 bargaining sessions over 23 months, the Board agreed with the ALJ that the respondent union violated 8(b)(3).

In his decision, the ALJ noted:

A party's good-faith obligation to negotiate includes a statutory duty to make its authorized representative available for negotiations at reasonable times and places. *Crane Co.*, 244 NLRB 103, 111 (1979). A party acts at its peril when it chooses as a bargaining agent someone who is encumbered by other conflicts which limit his availability. *Nursing Center at Vineland*, 318 NLRB 901, 905 (1995); *Caribe Staple Co.*, 313 NLRB 877, 893 (1994); *O & F Machine Products Co.*, 239 NLRB 1013, 1019 (1978); *Imperial Tile Co.*, 227 NLRB 1751, 1754 (1977); and *Exchange Parts Co.*, 139 NLRB 710, 714 (1962); *enfd.* 339 F.2d 829, 832 (5th Cir. 1965). Considerations of personal convenience, including those of professional conflicts, do not take precedence over the statutory obligation under Section 8(d) that bargaining take place with expedition and regularity. *Caribe Staple*, *supra*. If a given negotiator becomes indisposed or is otherwise unable to discharge his

statutory responsibility to negotiate, it is the duty of the party involved to designate a negotiator who can fully discharge his obligation. *"M" System, Inc.*, 129 NLRB 527, 549 (1960). Similarly, the obligation to meet at reasonable times is not diluted by the demands of a respondent's business. *Barclay Caterers*, 308 NLRB 1025, 1035 (1992). This principle is particularly appropriate when, as it is here, a major component of the business of Respondent *is* the negotiation of collective-bargaining agreements for those members which it represents.

(Emphasis added) 334 NLRB 1190, at 1249.

On cross-examination, Bowie first confirmed that a primary function of CWA District 1 is to negotiate contracts on behalf of its members. (Tr. 274) Bowie then testified that she talked to her boss Debora Hayes, Area Director for CWA District 1, about her workload and asked for help. Hayes denied Bowie's request. (Tr. 327-328)

It is also significant that when Bowie left the country on vacation for six weeks from December 25, 2015 through February 1, 2016, Hayes filled in for Bowie. Hayes was not prepared. (Tr. 80, 113) In *Eastern Maine Medical Center*, 253 NLRB 224, 247 (1980), ALJ Giannasi found evidence of bad faith based on the employer's attorney utilizing an associate from his law firm to fill in for him, allowing for more frequent meetings, because this option was not utilized earlier in the negotiations. Bowie testified that in CWA District 1 there were about 20 Staff Representatives who negotiated contracts. (Tr. 272-273) In the Buffalo area office, contracts are also negotiated by Hayes and John Klein, the other Staff Representative. (Tr. 271-273) Despite all of these potential experienced negotiators, the Union refused to replace Bowie or otherwise provide assistance to allow for more frequent meetings. (Tr. 327-328) The Union must bear the consequences of its failure to act.

**C. THE JUDGE CORRECTLY FOUND THAT BOWIE'S CONDUCT WAS DILATORY AND IN BAD FAITH**

While the Union's failure to schedule bargaining sessions due to Bowie's busy work schedule, and the Union's failure to provide help to Bowie or select a different negotiator are

sufficient to conclude that the Union violated Section 8(b)(3) by not satisfying the Section 8(d) requirement “to meet at reasonable times,” Bowie’s conduct throughout the negotiations proves that Bowie was acting in bad faith.

Each of these items or events is described in more detail in the Facts and illustrate Bowie’s bad faith.

- Despite scheduling consecutive bargaining dates multiple times during May, June and July 2015 for the Frontier and American Red Cross negotiations (Tr. 306-311; C.P. Ex. 6), Bowie never offered the Hospital consecutive dates or multiple days in the same week for bargaining. (Tr. 327)
- Despite taking the initiative and calling Tomasello to schedule two days of bargaining each week in March, April and May of 2016 for the Mercy negotiations (Tr. 82-83, 101-103, 127-128, 239, 247-248, 323), Bowie never took the initiative in the St. Joseph Campus RN negotiations and never called, or otherwise communicated with, Tomasello to schedule bargaining dates for the Hospital without Tomasello having first made multiple requests for more bargaining dates.
- Despite the prior practice between the parties to start bargaining two months before expiration and bargain at least one day each week (Tr. 38, 42, 134, 136, 138), Bowie refused to meet at all in July 2015 and had to be threatened with a contract violation to start bargaining on June 29. (Tr. 41, 43-45, C.P. Ex. 2)
- Bowie told Tomasello in their June 12, 2015 phone conversation that she had no availability at all during July 2015 (Tr. 41) when, based on Bowie’s testimony about how she scheduled bargaining dates for the Frontier and American Red Cross negotiations (Tr. 310-311; C.P. Ex. 6), Bowie had at least nine open dates in July when she spoke to Tomasello on June 12.
- Bowie unilaterally established the bargaining times for, and duration of, each negotiation session at 9:30 a.m. to 5:00 p.m. (Tr. 53, 141, 225, 294-295). Despite the prior practice between the parties to negotiate into the evening, beyond 7:00 p.m., the Union never did so. (Tr. 38, 97)
- Bowie repeatedly denied Tomasello’s request to stay later and continue to bargain. (Tr. 58-59, 60-61, 62, 63-64, 66, 72, 73, 142, 145)
- At the June 29 and August 5 and 12 negotiation sessions, while Tomasello was presenting and explaining Hospital proposals, Bowie interrupted Tomasello and left the room. On August 5 and 12, Bowie’s early departure ended the meeting. Bowie’s excuses were to catch a flight, to take a phone call and that she had another appointment. (Tr. 54, 56-57, 117, 140)
- At the August 26 meeting, Bowie sent a text to Tomasello at 4:45 p.m. telling Tomasello that the Union was ready. As the Hospital’s negotiation team was walking to the negotiation room, Bowie called Tomasello and told her the Union was done and leaving for the day. (Tr. 60-61, 142)

- In late August, Bowie repeatedly refused to schedule bargaining sessions in September with the Hospital because she claimed that she was waiting to learn of the date of an NLRB election. (Tr. 59-60, 142) Bowie admitted that at the same time she was refusing to schedule September dates with the Hospital, she was scheduling dates in September with other employers. (Tr. 59-60, 298-300; C.P. Ex. 6) Despite committing to Tomasello that she would call Tomasello with Bowie's dates of availability after she found out the date of the election, Bowie did not do so. (Tr. 99-100, 302, 304) Bowie continued to put off Tomasello's multiple requests for September bargaining dates even after Bowie was informed of the election date. (Tr. 60, 142, 303-304)
- In response to a request from Tomasello at the September 17 bargaining session Bowie told Tomasello that if she wanted more bargaining dates, the Hospital would have to settle grievances. (Tr. 100, 143-144)
- After the contract expired on August 31, 2015, and despite repeated requests for bargaining dates from Tomasello and Tomasello's repeated offers to clear the Hospital's calendar, Bowie offered exactly two dates for bargaining in each calendar month. If Tomasello did not accept the dates offered by Bowie, Bowie had no flexibility and told Tomasello that there would be no bargaining if Tomasello could not accept the dates offered. (Tr. 69, 73-74, 249)
- In mid-October 2015 the Union published a Negotiation Update that it then distributed to employees. In this handbill/flyer, the Union stated that the NLRB said it should have bargained more and told the employees that it had scheduled and would continue to schedule two bargaining dates each month. (Tr. 67-69; G.C. Ex. 9)
- Despite sending an October 31, 2015 email to the Union bargaining committee informing them that she had ten open dates in December, Bowie never called Tomasello to offer these dates for bargaining. (Tr. 319-321; C.P. Ex. 4) Bowie waited more than three weeks, until the November 25, 2015 bargaining session, and then, only after Tomasello again requested bargaining dates for December, did Bowie offer only two dates. (Tr. 73-74, 319-321)

Based on Bowie's repeated dilatory tactics and conduct, the Union has violated its obligation to meet at reasonable times under Section 8(d) and violated its duty to bargain in good faith under Section 8(a)(3). The NLRB has consistently found such conduct to violate a party's duty to bargain in good faith. *Camelot Terrace*, 357 NLRB No. 161, 2011 WL 7121892 at p. 2 (2011); *Garden Ridge Management, Inc.*, 347 NLRB 131, at 131-133, 142, 147 (2006); *Regency Service Carts, Inc.*, 345 NLRB 671, at 673-674, 716-717 (2005); *Teamsters Local Union No. 122, International Brotherhood of Teamsters, AFL-CIO*, 334 NLRB 1190, at 1191, 1232-1233, 1249-1251 (2001); *People Care, Inc.*, 327 NLRB 814, at 818-819, 826 (1999); *Calex Corporation*, 322 NLRB 977, at 977-978 (1997); *Lower Bucks Cooking & Heating, Inc.*, 316 NLRB 16, at 23 (1995); *Barclay Caterers, Inc.*, 308 NLRB 1025, at 1027, 1035-1037 (1992); *Eastern Maine Medical*

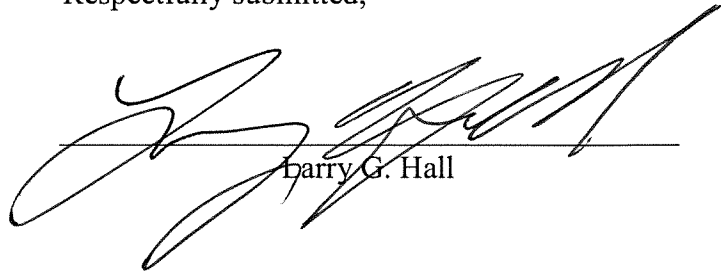
*Center*, 253 NLRB 224, at 247 (1980); *Local Union #612, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 215 NLRB 789, at 791-792 (1974).

### **CONCLUSION**

Based on the foregoing Facts, Arguments and Authorities, Charging Party St. Joseph Campus respectfully submits that the Board should reject Respondent's exceptions and accept Judge Dawson's Decision that the Union unlawfully failed to meet and bargain at reasonable times.

Dated: August 11, 2016

Respectfully submitted,



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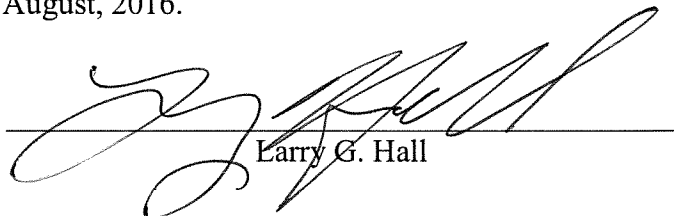
## **CERTIFICATE OF SERVICE**

The undersigned, an attorney, certifies that that a copy of the foregoing **Charging Party's Brief in Opposition to Respondent's Exceptions to Decision of Administrative Law Judge Donna Dawson** was served upon the following parties:

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by email transmission to the email addresses indicated above and by enclosing a true and correct copy of same in a Federal Express envelope and shipping via Federal Express delivery to the addresses indicated above on the 11<sup>th</sup> day of August, 2016.



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